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State of New York Public Employment Relations Board Decisions from March 5, 2012

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from March 5, 2012

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6080

SEWANHAKA CENTRAL HIGH SCHOOL DISTRICT,

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

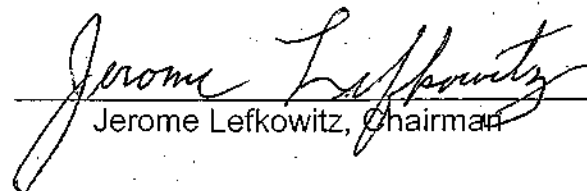
public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All regular part-time lunchroom personnel.

Excluded: Administrative and supervisory personnel and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6090

TOWN OF PLATTEKILL,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

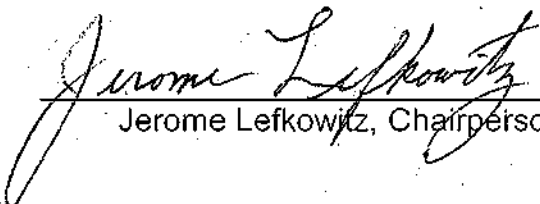
IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.


Included: Assessor, Assessor Aide, Building Inspector, Court Clerk, Court Officer and Planning & Zoning Clerk.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6096

COMMACK UNION FREE SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

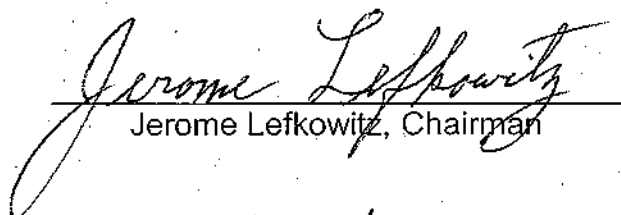
IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Custodian, Driver Messenger, Mechanic's Helper, Groundsperson, Lead Groundsperson, Head Custodian, Elementary Custodial Worker II, Assistant Head Groundsperson, Custodial Worker II (MS, HS), Chief Custodian, Head Custodian, Intermediate HS/MS Chief Custodian, Maintenance Mechanic, Head Groundsperson and Storekeeper.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

JOHN F. KENNEDY CATHOLIC HIGH SCHOOL

Petitioner,

-and-

CASE NO. CE-6107

LAY FACULTY ASSOCIATION, LIUNA, LOCAL 1255,

Respondent.

BOARD DECISION AND ORDER

On December 21, 2011, John F. Kennedy Catholic High School (employer) filed, in accordance with the State Employment Relations Act, a timely petition seeking decertification of Lay Faculty Association, LIUNA, Local 1255 (respondent) as the exclusive representative of certain employees of the employer.

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: Full and Regular Part-time Lay Faculty Members (including librarians and guidance counselors).

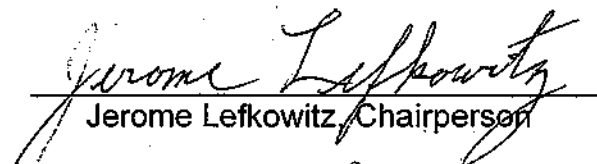
Excluded: All clerical, supervisory and professional and religious employees.

Pursuant to that agreement, a secret-ballot election was held on February 22, 2012, at which a majority of ballots were cast against representation by the respondent.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of

collective bargaining by the respondent, IT IS ORDERED that the Lay Faculty Association, LIUNA, Local 1255 be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

In the Matter of

FRANCIS W. CORCORAN,

Petitioner,

-and-

CASE NO. C-5879

KIPP ACADEMY CHARTER SCHOOL,

Employer,

-and-

**UNITED FEDERATION OF TEACHERS, LOCAL 2,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,**

Intervenor.

VEDDER PRICE P.C. (LYLE S. ZUCKERMAN of counsel), for Petitioner

**KEHL, KATZIVE & SIMON, LLP (SHELLEY SANDERS KEHL of counsel), for
Employer**

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (MARIA ELENA
GONZALEZ AND JENNIFER HOGAN of counsel), for Intervenor**

BOARD DECISION AND ORDER

This case comes to the Board on separate exceptions filed by Francis W. Corcoran (Corcoran) and by KIPP Academy Charter School (KIPP Academy) to a decision of an Administrative Law Judge (ALJ) dismissing a petition, as amended, filed by Corcoran seeking to decertify the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) as the collective bargaining representative for

employees working for KIPP Academy pursuant to §207 of the Public Employees' Fair Employment Act (Act).¹

In dismissing the petition, the ALJ concluded that KIPP Academy is a conversion charter school and that the at-issue employees are in the UFT-represented unit of employees working for the Board of Education of the City School District of the City of New York (District) pursuant to Education Law §2854.3(b) of the New York Charter Schools Act of 1998 (Charter Schools Act).² In addition, the ALJ found that the decertification petition filed by Corcoran is not supported by a sufficient showing of interest to decertify UFT as the representative of that District-wide unit. Finally, the ALJ declined to determine whether KIPP Academy employees should be fragmented from the UFT-represented unit because the representation petition did not seek fragmentation.

EXCEPTIONS

In his exceptions, Corcoran contends the ALJ erred in concluding that KIPP Academy is a conversion charter school under Education Law §2854.3(b) because it was not converted from an "existing public school," which ceased to operate following its metamorphosis into a charter school. In addition, Corcoran challenges the ALJ's failure to treat KIPP Academy as a separate and distinct negotiation unit pursuant to Education Law §2854.3(b). At the same time, Corcoran avers that the Board and the ALJ lack authority to interpret Education Law §2854.3(b). Corcoran also asserts that

¹ 43 PERB ¶4022 (2010).

² Educ Law §2850. *et seq.*

the ALJ erred in finding that he did not submit a sufficient showing of interest to decertify UFT as the representative of a unit composed of KIPP Academy employees. Finally, Corcoran excepts to the ALJ's failure to determine whether the at-issue employees at KIPP Academy should be fragmented from the UFT-represented unit.

In its exceptions, KIPP Academy asserts that the ALJ exceeded this agency's jurisdiction by interpreting Education Law §2854.3(b). It claims that the evidence presented demonstrates that it is not a conversion charter school under Education Law §2854.3(b), and that the at-issue employees are not within the UFT-represented unit of District employees. It also contends that the ALJ erred in finding that Corcoran did not submit a sufficient showing of interest to decertify UFT, and by failing to rule on the issue of fragmentation.

UFT supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ dismissing the petition, as modified.

FACTS

On May 4, 2000, the Board of Regents of the University of the State of New York (Board of Regents) approved an application by David J. Levin (Levin) for the issuance of a conversion charter for KIPP Academy.³ Levin's charter school application was

³ UFT Exhibit 2, p. 6. Transcript, pp. 185-187, 197-198. The charter issued by the Board of Regents states: "A charter valid for a term of five years, effective September 1, 2000, is granted to the KIPP Academy Charter School pursuant to Article 56 of the Education Law and in accordance with the attached charter agreement dated March 6, 2000 between David J. Levin on behalf of the KIPP Academy Charter School and the Chancellor of the Board of Education of the City of New York and the addenda dated April 13, 2000, April 14, 2000 and April

approved by the Board of Regents based upon a favorable April 27, 2000 written recommendation from New York State Education Department (SED) Deputy Commissioner James A. Kadamus (Kadamus).⁴ Deputy Commissioner Kadamus's recommendation stated that, if approved, KIPP Academy would be a conversion school serving grades 5-8 and that it would remain at its current location.

The recommendation from Kadamus was made after SED reviewed Levin's application, as revised, which was transmitted to SED by the District's Chancellor (Chancellor) in April 2000. Along with the application, the Chancellor sent the following: a letter requesting "that a charter be approved for the conversion of KIPP Academy Charter School;" the charter agreement between the Chancellor and KIPP Academy; and internal District correspondence concerning the application.⁵ Prior to Kadamus's recommendation and the final action taken by the Board of Regents, Levin was required to respond to specific questions and concerns from SED and to submit a revised version of the application.⁶ Levin's original application explicitly sought "the conversion of an existing public school to a charter school." SED did not object to the treatment of KIPP Academy as an "existing public school" under the Charter Schools Act and it did not require Levin to revise the application to indicate that it was seeking a non-conversion charter.

⁴ UFT Exhibit 2, pp. 10, 12-13, 39-41.

⁵ Joint Exhibit 1, pp. 1-17; Transcript, p. 197. Joint Exhibit 1 includes three sets of documents: Charter and Related Correspondence; KIPP Charter Proposal and Application; and KIPP Academy Charter School Proposal Attachments.

⁶ Joint Exhibit 1, pp. 178-186.

The correspondence forwarded by the Chancellor to SED with Levin's application included a letter from the District's Director of Office of Parent Advocacy & Engagement, Michael Carter (Carter), to the District's Supervising Superintendent of Executive and New School Development, Dr. Arthur Greenberg (Greenberg), verifying the procedures and the results of an election conducted involving parents or guardians of KIPP Academy students on October 14, 1999, which approved "converting their school to a charter school."⁷ Greenberg was then in charge of reviewing charter applications for the Chancellor.⁸ The correspondence sent to SED also included an internal District memorandum from Greenberg dated March 6, 2000, regarding Levin's application, which states:

As part of the process of considering applications for the conversion of existing Board of Education schools and programs to Charter Status, we ask that superintendents consult locally and send us an impact statement. Attached is a response from Dr. Vega, Superintendent of Community School District 7. While her response raises some issues related to the impact of converting KIPP academy to Charter Status, we remain in support of the conversion.⁹

The KIPP Academy Charter School Proposal included a copy of a June 30, 1999 District-UFT agreement concerning the contractual rights of UFT-represented employees employed in charter schools that were converted under the Charter Schools Act. The 1999 District-UFT agreement states that "employees of a Conversion Charter

⁷ Joint Exhibit 1, p. 6. The KIPP Academy Charter School Proposal Attachments includes KIPP Academy documentation regarding the October 14, 1999 parent vote approving the potential change to charter status. Joint Exhibit 1, pp. 119-125.

⁸ Transcript, pp. 104-105.

⁹ Joint Exhibit 1, n. 10.

School shall be subject to the collective bargaining agreements for like titles or positions, in accordance with the Charter Schools Law, including but not limited to salary, medical, pension and welfare benefits and applicable due process procedures."¹⁰ Levin's application, however, includes a document setting forth personnel policies for the charter school that refers to annual individual employee contracts with guidelines which, if violated, would constitute grounds for discharge.¹¹

Prior to issuance of the charter by the Board of Regents, Levin was the Director of Knowledge Is Power Program (KIPP) Academy, which offered enriched college preparatory education for students in grades 5-8 in PS 156 in the South Bronx. Documentation attached to the application describes KIPP Academy as a "middle school,"¹² a "middle school program"¹³ or a "program" at PS 156 aimed at addressing that school's Schools under Registration Review (SURR) status.¹⁴ It is not disputed that KIPP Academy was affiliated with and housed within PS 156, an elementary school located in the IS 151 complex along with three other schools, PS 31, PS 168 and IS 151. Before it became a charter school, KIPP Academy did not maintain a separate budget, it did not have a distinct attendance tracking system code, its students and personnel were on the PS 156 roster and its teachers were in the UFT-represented

¹⁰ Joint Exhibit 1, p. 118.

¹¹ Joint Exhibit 1, p. 109.

¹² Joint Exhibit 1, pp. 38-39, 46.

¹³ Joint Exhibit 1, p. 37, 44.

¹⁴ Joint Exhibit 1, p. 16.

unit.¹⁵ Since the charter was issued, PS 156 has continued to operate as a public school, and KIPP Academy students became students of the charter school. All the teachers hired by KIPP Academy had been District teachers in the UFT-represented unit, which is comprised of approximately 75,000 District employees.

UFT never sought voluntary recognition from KIPP Academy, and UFT has not been certified by this agency or recognized by KIPP Academy as the exclusive representative of the charter school employees. Nor is there evidence that KIPP Academy employees have asked UFT to negotiate with KIPP Academy for modifications to the UFT-District collectively negotiated agreement. Many KIPP Academy employees continue to pay UFT membership dues through payroll deduction and have received benefits through UFT's health and welfare fund.

During the representation hearing before the ALJ, SED supervisor Dr. Lisa Long (Long) testified that it was her understanding that once a public school converts to a charter school, the public school ceases to exist.¹⁶ Long also stated that SED rejected an application submitted by the Chancellor in 2003 or 2004 seeking the conversion of the Future Leaders Institute Program to a charter school. According to Long, SED required the Chancellor to convert that program into a school and then reapply for a charter conversion, which was granted in 2005 or 2006.¹⁷

¹⁵ Transcript, pp. 68, 75-77, 131-132; Joint Exhibit 1, p. 177.

¹⁶ Transcript, pp. 228-229.

¹⁷ Transcript. pp. 175-176, 206-207, 223-225.

In 2005, the Board of Regents voted to extend the charter granted to KIPP Academy until September 1, 2010.¹⁸ In 2009, the Board of Regents approved the proposed revision of the KIPP Academy charter.¹⁹

DISCUSSION

A. PERB Has Primary Jurisdiction over Questions of Representation and Improper Practices at New York Charter Schools

We reject the challenge made by Corcoran and KIPP Academy to the authority of the Board and the ALJ to interpret Education Law §2854.3(b). Under the Charter Schools Act, the Legislature granted us primary jurisdiction to interpret and apply the school personnel provisions for New York charter schools, including questions of representation, improper practices, reasonable access, employer neutrality and related issues.²⁰

Education Law §2854.3(a) unambiguously provides that charter schools and their employees are covered by the Act. Therefore, we must interpret Education Law §§2854.3(b) and (b-1), which codify unique unit placement and representation rights for charter school employees. The Legislature mandated in Education Law §2854.3(b) that employees of a charter school that was converted from an existing public school, "shall be deemed to be included within the negotiating unit containing like titles or positions, if

¹⁸ Joint Exhibit 3.

¹⁹ Joint Exhibit 4.

²⁰ Educ Law §2854.3; *see also*, *Brooklyn Excelsior Charter Sch and Buffalo United Charter Sch*, 44 PERB ¶13001 (2011) (appeal pending).

any, for the school district in which such charter school is located and shall be subject to the collective bargaining agreement covering that school district negotiating unit...."

In addition, when certain statutorily prescribed circumstances are met under Education Law §2854.3(b-1), an incumbent employee organization representing similar employees in a school district where a non-conversion charter school is located is deemed, as a matter of law, to be the representative of "a separate negotiation unit" of similar employees working at that charter school.²¹ However, the employees of a non-conversion charter school are not subject to the terms of the negotiated agreement for the school district employees.²²

Pursuant to Education Law §§2854.3(c-2) and 2855.1(d), we are granted jurisdiction to determine whether a charter school or its agents are violating §209-a.1 of the Act. The Legislature has also granted us a preliminary adjudicatory role with respect to the revocation of a charter and authorizes us to hear and determine a charge alleging that a charter school is engaging in a pattern and practice of violating §209-a.1 of the Act.²³ Education Law §2855.1(d) states that any charter can be revoked or terminated:

When the public employment relations board makes a determination that the charter school demonstrates a practice and pattern of egregious and intentional violations of subdivision one of section two hundred nine-a of the civil

²¹ See, *Niagara Charter Sch*, 42 PERB ¶13036 (2009).

²² Educ Law §2854.3(b-1)(iv).

²³ See, *NYCTA*, 43 PERB ¶13038, n. 9 (2010)(noting that the Charter Schools Act grants PERB jurisdiction to hear improper practice charges alleging that a charter school is engaging in a pattern and practice of violating §§209-a 1(a) and (c) of the Act).

service law involving interference with or discrimination against employee rights under article fourteen of the civil service law. (Emphasis added.)

Finally, we have been granted primary jurisdiction by the Legislature for interpreting and applying the unique reasonable access and employer neutrality provisions applicable to charter schools under Education Law §§2854.3(c-1) and (c-2).

Even if the Legislature had not granted us primary jurisdiction over school personnel issues under the Charter Schools Act, we are not prohibited from interpreting statutes other than the Act. As we noted in *Town of Wallkill*,²⁴ during the course of processing representation petitions and improper practice charges, questions of statutory interpretation concerning the Act and related laws are frequently presented. While our statutory interpretations may be granted different degrees of deference by the courts, depending upon whether it involves interpreting a statutory term of art under the Act and the labor relations provisions of related statutes, or it involves discerning legislative intent, we are not prohibited from engaging in statutory interpretation.

Next, we turn to the exceptions challenging the ALJ's conclusion that KIPP Academy is a conversion of an existing public school under the Charter Schools Act.

B. KIPP Academy is a Conversion Charter School

Although we have primary jurisdiction over the above-referred labor relations issues, the Board of Regents has sole authority under the Charter Schools Act to issue a charter after reviewing the charter application, the supporting documentation and the

²⁴ 42 PERB ¶13017 (2009), *pet dismissed*, *Town of Wallkill v New York State Pub Empl Rel Bd.* 43 PERB ¶17005 (Sup Ct Albany County 2010)(appeal pending).

recommendation and approval submitted by the applicable charter entity.²⁵ The charter entity, which is the Chancellor in the present case, is solely responsible for approving the issuance of a charter after determining that the application meets the criteria set forth in Education Law §2852.2, including that the "charter school described in the application meets the requirements set out in this article and all other applicable laws, rules and regulations." The Chancellor is not required to approve an application and recommend that a charter be issued and may require an applicant to modify or supplement an application as a condition of approval.²⁶ Had the Chancellor denied the charter conversion application concerning KIPP Academy, the denial would have been final and non-reviewable.²⁷

The Charter Schools Act contains specific references with respect to the conversion of an existing school into a charter school. Pursuant to Education Law §2851.3(c), the Chancellor is identified as the only charter entity that can receive and approve a charter application for the conversion of an existing public school in New York City. The Chancellor, however, can not approve such an application unless it is supported by a majority of the parents or guardians of the at-issue students as demonstrated by the results of an election:

(c) The board of regents

The board of regents shall be the only entity authorized to issue a charter pursuant to this article. Notwithstanding any

²⁵ Educ Law §§202, 2851.3 and 2852.5-a.

²⁶ Educ Law §2852.3.

²⁷ Educ Law §2852.6

provision of this subdivision to the contrary, an application for the conversion of an existing public school to a charter school shall be submitted to, and may only be approved by, the charter entity set forth in paragraph (a) of this subdivision. Any such application for conversion shall be consistent with this section, and the charter entity shall require that parents or guardians of a majority of the students then enrolled in the existing public school vote in favor of converting the school to a charter school. (Emphasis added)

The approval of a conversion application by the Chancellor, and the subsequent grant of a charter by the Board of Regents, has specific legal implications under the Charter Schools Act. The conversion charter is exempted from the limit on the total number of charters that may be issued, as set by the Legislature in Education Law §2852.9. Also, the employees of a conversion charter school are subject to the unique representation and unit placement provisions set forth in Education Law §2854.3(b).

Under Education Law §§2851(c) and 2852.2(a), the Board of Regents and the Chancellor have been granted the regulatory responsibility for ensuring that an application for "conversion from an existing public school" in New York City to a charter school meets the applicable standards for conversion. The Charter Schools Act grants the Board of Regents and the Chancellor broad discretion in choosing the applicable standards for determining what is an eligible "existing public school" for conversion. Their discretion is in contrast to the statutorily defined six factors that must be applied when they are determining "whether an application involves the conversion of an existing private school."²⁸

The record in the present case demonstrates that the Board of Regents issued a charter to KIPP Academy Charter School converting KIPP Academy to a charter school based upon the recommendation of SED staff. It is reasonable to conclude that SED's recommendation was based upon a finding that KIPP Academy satisfied the requisite standards for being an "existing public school" for such conversion. The charter was issued following SED's review of the application, the supporting documentation forwarded by the Chancellor along with the Chancellor's approval, which all treated the application as seeking a conversion from an "existing public school." Notably, the issuance of the conversion charter to KIPP Academy freed the Board of Regents to issue at least one additional charter because a conversion charter is exempted from the legislatively imposed cap set by Education Law §2852.9.

Throughout the review and approval process, the Chancellor treated Levin's application as one seeking to convert KIPP Academy from an existing public school to a charter school. Prior to approving the application, the procedures and results of the election conducted among KIPP Academy parents and guardians pursuant to Education Law §2851.3(c) were verified by District staff. Such an election among parents and guardians is required under the Charter Schools Act only for an application that seeks conversion of an existing public school to a charter school. In addition, the correspondence and memoranda from the Chancellor and Supervising Superintendent of Executive and New School Development Greenberg repeatedly described the application as one seeking conversion of KIPP Academy to a charter school. Indeed, the Chancellor's written approval of the application sent to the Board of Regents refers

Based upon the foregoing acts of the Board of Regents, SED, and the Chancellor, we conclude that approval of the charter application and the issuance of the charter to KIPP Academy constituted the conversion of KIPP Academy from an "existing public school" to a charter school under the Charter Schools Act. The content of the approved application, and the documents supporting issuance, demonstrate that the Board of Regents, SED and the Chancellor found that KIPP Academy met the prerequisite of being an "existing public school" for a conversion. Otherwise, the charter application would have been denied by the Chancellor pursuant to Education Law §2852.6, SED would have required Levin to submit a revised application for a non-conversion charter, or the Board of Regents would have denied issuance of the charter.

Finally, we reject the efforts by Corcoran and KIPP Academy to collaterally attack the actions by the Board of Regents and the Chancellor in approving the application to convert KIPP Academy from an existing public school to a charter school, and in issuing a charter pursuant to that approved conversion application. Those administrative actions are immune from collateral attack because the Board of Regents and the Chancellor acted well within their authority and jurisdiction under the Charter Schools Act to regulate the issuance of a charter on an application to convert an existing public school.²⁹

Alternatively, we find that the evidence cited by Corcoran and KIPP Academy is insufficient to undermine the administrative actions taken by the Board of Regents and the Chancellor. SED supervisor Long's understanding that an existing public school

²⁹ *New York State Pub Empl Rel Bd v Bd of Ed of the City of Buffalo*, 39 NY2d 86, 9 PERB ¶17004 (1976); *Fov v Schechter*, 1 NY2d 604 (1956).

must cease to operate following a charter conversion is unpersuasive and is not binding upon the Board of Regents, the Chancellor or this agency. In addition, that KIPP Academy did not maintain a distinct budget, attendance tracking system code, or student and personnel rosters, does not persuade us that KIPP Academy is ineligible to be an "existing public school" for purposes of the Charter Schools Act. There is nothing in the Charter Schools Act, its legislative history or applicable regulations to demonstrate that the Legislature intended the Board of Regents, SED and the Chancellor to consider those factors when determining whether an entity is an "existing public school" for purposes of a conversion.

Therefore, it is unnecessary for us to make a *de novo* determination on the issue of whether KIPP Academy is an "existing public school" for purposes of the Charter Schools Act. The prior findings by the Board of Regents, SED and the Chancellor concerning KIPP Academy's eligibility as an "existing public school" for conversion under Education Law §2851.3(c) are binding upon us. In light of those findings, we affirm the ALJ's conclusion that KIPP Academy is an "existing public school" under Education Law §2854.3(b).

We note, however, that our rejection of the collateral attack on the actions of the Board of Regents and the Chancellor does not prevent Corcoran or KIPP Academy from seeking revocation of the charter on the ground that it was issued in violation of the Charter Schools Act because KIPP Academy was not "an existing public school." Whether revocation is appropriate, particularly in light of the 2005 renewal and the 2009 revision, rests in the judgment of the Board of Regents or the Chancellor.

We next turn to the exceptions challenging the ALJ's conclusion that the KIPP Academy employees subject to Corcoran's decertification petition are in the UFT-represented unit of District employees.

C. The At-Issue Employees Are in the District-Wide Unit Represented by UFT Pursuant to Education Law §2854.3(b)

Pursuant to Education Law §2854.1(a), the provisions of the Charter Schools Act have supremacy over all other inconsistent provisions of New York law and regulations, including provisions of the Act and our Rules of Procedure (Rules).³⁰ Education Law §2854.1(a) states:

Notwithstanding any provision of law to the contrary, to the extent that any provision of this article is inconsistent with any other state or local law, rule or regulation, the provisions of this article shall govern and be controlling.

In *Brooklyn Excelsior Charter School and Buffalo United Charter School*,³¹ we held that the provisions of the Charter Schools Act supersede our joint public-private employer relationship precedent, as well as our authority under §201.6(b) of the Act to designate a joint public employer for a charter school, and deprive us of jurisdiction to hear applications filed under §201.7(a) of the Act seeking to designate a charter school employee as a managerial or confidential employee excluded from coverage under the Act.

³⁰ See, *Brooklyn Excelsior Charter Sch and Buffalo United Charter Sch*, *supra* note 20. See also, *International High School v Mills*, 276 AD2d 165 (3d Dept 2000) (Regents examination requirement of Charter Schools Act supersedes prior variances granted to a school under the Twenty-First Century School Act, Educ Law §309-a.).

Pursuant to Education Law §2854.3(a), an employee of a charter school is the "employee of the education corporation formed to operate the charter school and not an employee of the local school district in which the charter school is located." However, Education Law §2854.3(b) creates a unique unit placement rule and mandates certain collective bargaining rights for employees of a charter school "that has been converted from an existing public school" who are eligible for representation under the Act.

Education Law §2854.3(b) states:

The school employees of a charter school that has been converted from an existing public school who are eligible for representation under article fourteen of the civil service law shall be deemed to be included within the negotiating unit containing like titles or positions, if any, for the school district in which such charter school is located and shall be subject to the collective bargaining agreement covering that school district negotiating unit; provided, however, that a majority of the members of a negotiating unit within a charter school may modify, in writing, a collective bargaining agreement for the purposes of employment in the charter school with the approval of the board of trustees of the charter school.

The first clause of Education Law §2854.3(b) appears to be a clear and unambiguous legislative mandate placing employees in a converted charter school in the negotiating unit, if any, of similar titles or positions of the school district where the charter school is located, and making them subject to the collectively negotiated agreement for that school district unit. The second clause of Education Law §2854.3(b), however, suggests an ambiguity concerning the meaning of the first. In the second clause, the Legislature grants "a majority of the members of a negotiating unit within a charter school" the right to modify a collective bargaining agreement "for purposes of

employment in the charter school" with the approval of the Board of Trustees of the charter school.

A fundamental rule of statutory construction requires that a statute be "construed as a whole, and that all parts of an act are to be read and construed together to determine the legislative intent."³² In construing a statute, all of its parts must be harmonized with each other for purposes of determining legislative intent.³³

Based upon our close textual analysis of the two clauses in Education Law §2854.3(b), and our comparison of them with the provisions of Education Law §2854.3(b-a), we conclude that the Legislature intended that employees of a converted charter school, as a matter of law, are in the applicable district-wide negotiating unit, if any, and subject to the existing agreement for that unit. At the same time, however, the Legislature granted conversion charter school employees the unique right to be represented in collective negotiations with the charter school for the purpose of modifying the terms of the existing district-wide agreement. Any negotiated modifications are subject to approval by a majority of the charter school employees and the charter school board of trustees.

Contrary to the arguments by Corcoran and KIPP Academy, we do not find that the second clause trumps the first in Education Law §2854.3(b) by creating a separate negotiating unit for conversion charter school employees. Such an interpretation would render superfluous the first clause's phrase "shall be deemed to be included within" the

³² Statutes, §97; *Brooklyn Excelsior Charter Sch and Buffalo United Charter Sch*, *supra*, note 20.

³³ Statutes, §98; *County of Erie*, 44 PERB ¶13027 (2011).

district-wide unit. To harmonize the two clauses, we conclude that the second clause's reference to "the members of a negotiating unit within a charter school" is intended only to provide conversion charter school employees with the unique standing of a subordinate unit to be represented by the incumbent employee organization in collective negotiations to change the terms of an existing district-wide agreement to meet their needs, which may be different from others within the district-wide unit. While the existence of a subordinate unit for negotiations within an existing larger unit and the statutory right to reopen the existing district-wide agreement are inconsistent with the Act and our precedent, they are superseded by the Charter Schools Act.³⁴

Furthermore, if the Legislature intended that employees of a conversion charter school be in a separate bargaining unit from the district-wide unit it would have unambiguously "said so"³⁵ as it did in Education Law §2854.3(b-a) concerning employees in non-conversion charter schools. Education Law §2854.3(b-a) states, in part, that employees of a non-conversion charter school:

shall not be deemed members of any existing collective bargaining unit representing employees of the school district in which the charter school is located, and the charter school and its employees shall not be subject to any existing collective bargaining agreement between the school district and its employees.

Education Law §2854.3(b-a) also provides that in certain non-conversion charter schools with a particular student enrollment:

³⁴ *Brooklyn Excelsior Charter Sch and Buffalo United Charter Sch*, *supra*, note 20.

³⁵ *New York Charter Sch Assn v Smith*, 15 NY2d 403, 410 (2010).

all employees of the school who are eligible for representation under article fourteen of the civil service law shall be deemed to be represented in a *separate negotiating unit* at the charter school by the same employee organization, if any, that represents like employees in the school district in which such charter school is located.
(Emphasis added)

This provision also mandates that those non-conversion charter school employees placed in a "separate negotiating unit" are not subject to:

any collective bargaining agreement between any public school district and its employees....[nor are] the employees of such charter school part of any negotiating unit at such school district. The charter school may, in its sole discretion, choose whether or not to offer the terms of any existing collective bargaining to school employees:

Based upon the foregoing, we affirm the ALJ's conclusion that the at-issue twenty-one employees of the KIPP Academy are, as a matter of law, within the District-wide unit represented by UFT because that unit includes similar titles or positions.

D. Corcoran's Decertification Petition Must Be Dismissed

Pursuant to §201.2(a) of our Rules, although individual employees lack standing to file a petition for certification, they may file a petition to decertify an incumbent employee organization.³⁶ A decertification petition that is not supported by a showing of interest of at least 30% of the members of the existing bargaining unit must be dismissed.³⁷ In this case, the relevant bargaining unit is the District-wide unit represented by UFT. Corcoran's petition seeks decertification of UFT but it is not

³⁶ *Inc Village of Hempstead*, 12 PERB ¶13051 (1979).

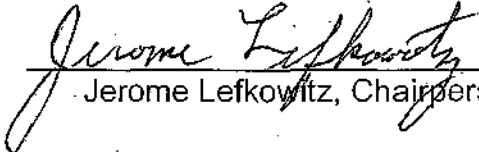
³⁷ Rules, §201.3(d); *New York State Div of Housing and Community Renewal*, 21 PERB ¶13010 (1988); *United LPN's*, 21 PERB ¶13004 (1988).

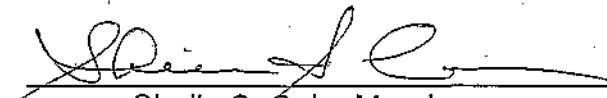
supported by 30% of the District-wide unit. Therefore, it was properly dismissed by the ALJ.³⁸

In their exceptions, Corcoran and KIPP Academy contend that the ALJ erred in failing to determine whether the employees of the charter school should be fragmented from the District-wide unit represented by UFT. While the notice of conference and hearing issued by the ALJ suggests that Corcoran's petition raises an issue of fragmentation,³⁹ it is well-settled under our Rules and precedent that individual employees lack standing to seek to fragment an existing unit.⁴⁰ Based upon the foregoing, to the extent that Corcoran's petition might be interpreted as seeking a fragmented unit, it must be dismissed.

IT IS THEREFORE ORDERED that Corcoran's petition to decertify UFT is dismissed.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

³⁸ ALJ Exhibit 1.

³⁹ ALJ Exhibit 7.

⁴⁰ See *State of New York (Dept of Taxation and Finance)*, 23 PERB ¶14049 (1990).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHARLES JOHNSON,

Charging Party,

CASE NO. U-29471

- and -

DANSVILLE SUPPORT STAFF ASSOCIATION,

Respondent,

- and -

DANSVILLE CENTRAL SCHOOL DISTRICT,

Employer.

**PETRALIA, WEBB & O'CONNELL, P.C. (ARNOLD R. PETRALIA, of counsel),
for Charging Party**

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (HAROLD EISENSTEIN,
of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Dansville Support Staff Association (Association) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by Charles Johnson (Johnson), as amended, which alleges that the Association violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it withdrew from arbitration a grievance filed by Johnson under the collectively negotiated agreement (agreement) between the Dansville Central School District (District) and the Association.¹

During the processing of the charge, the District was not made a statutory party pursuant to §209-a.3 of the Act and it chose not to intervene after being sent a copy of

the charge.² The District's attorney appeared and participated, in part, at the hearing before the ALJ.³

Following the hearing, the ALJ found that the Association violated §209-a.2(a) of the Act when Association President Janice Vogt (Vogt) withdrew the grievance from arbitration. As a remedy, the ALJ ordered the Association to reimburse Johnson for his reasonable legal fees and expenses connected with a lawsuit, if any, against the District for the remedy sought in his grievance.

EXCEPTIONS

In its exceptions, the Association asserts that the ALJ erred in concluding that it violated §209-a.2(a) of the Act by withdrawing Johnson's grievance. The Association asserts that the evidence demonstrates that the grievance was withdrawn for legitimate reasons: it lacked merit under the terms of the District-Association agreement, it was untimely and Johnson was not harmed by the alleged contractual breach. Finally, the Association excepts to the ALJ's remedial order. Johnson supports the ALJ's decision.

Following a request from the Board, Johnson and the Association submitted supplemental briefs concerning two issues:

Whether §209-a.3 of the Act requires that an employer be made a party with respect to a charge alleging that an employee organization violated §209-a.2(a) of the Act by failing to process a grievance alleging that the employer breached a collectively negotiated agreement; and

² Section 204.3(g) of our Rules of Procedure (Rules) states: A public employer which is made a party to an improper practice charge pursuant to section 209-a.3 of the act may file responsive pleadings in accordance with subdivisions (a)-(e) of this section. The administrative law judge may deem the public employer's failure to file any responsive pleading to constitute a waiver of the public employer's right to participate in any hearing held on the allegations of impropriety set forth in the charge.

³ Transcript, pp. 2, 5, 16, 48. While the District's attorney did not call or question

Whether the PERB Board has the authority under §213 of the Rules of Procedure (Rules) to add the Dansville Central School District (District) as a party pursuant to §209-a.3 of the Act when considering the exceptions to the decision and proposed remedy of the Administrative Law Judge (ALJ).

The District did not respond to the Board's notice offering it an opportunity to file a brief concerning the two issues set forth above.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision concluding that the Association violated §209-a.2(a) of the Act. In addition, we add the District as a statutory party consistent with §209-a.3 of the Act, and modify the remedial order.

FACTS

On November 5, 2008, Association Grievance Committee Chairman Robert F. Waltman (Waltman) began processing a class action grievance filed by Johnson. The gravamen of the grievance was that the District violated Article 18 of the agreement when it appointed Association President Vogt on October 14, 2008 to a newly-created monitor position at an hourly rate of \$16.00, which was \$8.70 above the hourly rate for a monitor under the agreement. The grievance alleged that when the District appointed other monitors, their hourly rates were set consistent with the contract rate. The grievance further alleged that when Johnson was appointed as head mechanic on July 1, 2006, his hourly rate was set consistent with the contract rate for that position. As remedies, the grievance sought a retroactive increase of \$8.70 in Johnson's hourly rate of pay from the date of his appointment as head mechanic, and an increase in the hourly rate for all other monitors to make their rate equivalent with the rate paid to Vogt. In the alternative, the grievance sought to adjust Vogt's salary to be in compliance with

After the District Director of Transportation denied the grievance at Step 1, Association Grievance Chairman Waltman sent a memorandum to the District Superintendent informing him that the Association Grievance Committee and Johnson wanted the grievance to be heard at Step 2. The Association Grievance Committee is comprised of Waltman, Lori Henry (Henry), Cristie Holbrook (Holbrook) and Jeffrey Hayes (Hayes). Vogt and NYSUT Labor Relations Specialist Christina Hamrick (Hamrick) are not members of the Grievance Committee.

Following Waltman's presentation of the grievance at Step 2, the District Superintendent issued a decision denying it on the grounds that the agreement does not require that all employees start at the hourly rate set by the agreement, and that the agreement is silent concerning the hourly rates for employees who transfer within or between departments. Finally, the Superintendent referenced several District employees who have been paid at an hourly rate above that set in the agreement.

On December 16, 2008, the Superintendent met with Waltman and Grievance Committee members Henry and Hayes to discuss the pending class action grievance. As a result of that meeting, the parties agreed to waive the timeframe for processing the grievance to Step 3 to provide an opportunity for the grievance to be amended, and to give the parties time to discuss a possible amicable resolution. Thereafter, an amendment to the class action grievance was filed, which deleted the explicit reference to Vogt but continued to refer to a monitor being appointed to a new position on October 14, 2008 at an hourly rate of \$16.00. As a remedy, the amended grievance sought specific adjustments to Johnson's rate of pay retroactive to his appointment as head mechanic. After reviewing the amendment, the Superintendent issued a supplemental decision on January 22, 2009 which reaffirmed his Step 2 denial of the

grievance.

On February 5, 2009, the Grievance Committee met and discussed the grievance. The handwritten minutes from the meeting state that the Grievance Committee voted to process the grievance to the Board of Education (Board) at Step 3, and "then to arbitration if necessary."⁴ The minutes also state that the Grievance Committee members "all feel [the grievance] needs to be moved forward."⁵

The following day, Waltman sent a memorandum to the Board stating that the Grievance Committee and Johnson were dissatisfied with the Step 2 decision and requesting a hearing before the Board. After a hearing, the Board issued a Step 3 decision denying the grievance on the grounds that the contract is silent regarding the rate of pay for employees who transfer within the District, and that the District has the discretion to set an hourly rate above the contractual minimum for employees who transfer to another District position. In addition, the Board concluded that the grievance is untimely.

During a telephone conversation on March 11, 2009, Labor Relations Specialist Hamrick asked Waltman to mail her documentation concerning the class action grievance. On March 13, 2009, Waltman mailed fourteen pages of documents to Hamrick's office in Rochester. On the same day, Waltman received a fax from Hamrick containing a copy of the demand for arbitration to the American Arbitration Association dated March 11, 2009, concerning the class action grievance.

The arbitration concerning the class action grievance was scheduled for June 16,

⁴ Charging Party, Exhibit 11. All of the Grievance Committee members present at the meeting voted in favor of processing the grievance to arbitration. Member Hayes was absent due to an illness.

2009. On May 12, 2009, following discussions during an executive session of the Association Executive Committee meeting, Vogt made the decision to withdraw the class action grievance. It is not disputed that no other member of the Executive Committee participated in the withdrawal decision.

In an e-mail dated May 13, 2009, Vogt directed Hamrick to withdraw the grievance. In her e-mail, Vogt set forth the reasons for her decision: a) the Grievance Committee was unsure if it had all the necessary information and documents, and it lacked sufficient time to review the materials; b) Hamrick did not receive the documents sent by Waltman regarding the grievance; c) Waltman responded neither to Vogt's April 2, 2009 letter nor to her voice messages concerning the grievance; d) Vogt scheduled a meeting with Waltman and the Grievance Committee for April 29, 2009, which was postponed at Waltman's request; e) the grievance is untimely and the terms of the agreement do not support the grievance; and f) Hamrick lacked sufficient time to prepare for the scheduled arbitration. In her e-mail and during her testimony, Vogt also stated that her decision to withdraw was made based upon the recommendation of Hamrick.

During the hearing, Waltman testified that Grievance Committee members had all the relevant information and documentation necessary for deciding to pursue the grievance. In addition, Waltman testified that he never received Vogt's letter. While in the hospital, however, he did learn that Vogt wanted to meet on April 29, 2009 with respect to the grievance. Due to his hospitalization, Waltman had another Association member attend the meeting. On May 29, 2009, Waltman learned that the class action grievance was withdrawn when he received a faxed copy of Vogt's May 13, 2009 e-mail

During her testimony, Vogt stated that prior to her decision to withdraw the grievance she had had several conversations with unidentified Grievance Committee members who expressed unspecified concerns about the grievance. In defending against the charge, the Association did not call Hamrick to testify, and failed to offer into evidence copies of the District-Association agreement or the applicable contract provision⁶, Vogt's April 2, 2009 letter, and minutes or notes taken during the Executive Committee's May 12, 2009 meeting.

DISCUSSION

It is well-settled that in order to establish a breach of the duty of fair representation, a charging party must prove that an employee organization acted in a manner that was arbitrary, discriminatory or in bad faith.⁷ While an employee organization is entitled to a broad range of reasonable discretion under the Act in processing a grievance,⁸ and in determining whether to take that grievance to arbitration,⁹ such discretion is not unlimited.

There is no objective evidence in the record to support the Association's arguments that the grievance was withdrawn because it lacked merit, it was untimely or

⁶ The amended charge and its attachments were made part of the record. ALJ 1, Transcript, p. 6. They were received into the record as background information concerning the processing of the charge. A grievance procedure attached to the pleading might be from the parties' agreement. However, without an evidentiary foundation or a stipulation, we cannot be certain, and we will not consider it in determining the Association's exceptions. ALJ Exhibit 1; Transcript, p. 6.

⁷ *Nassau Comm Coll Federation of Teachers, Local 3150 (Staskowski)*, 42 PERB ¶3007 (2009).

⁸ *Rochester Teachers Assn (Danna)*, 41 PERB ¶3003 (2008).

⁹ *Symanski v East Ramapo Cent Sch Dist*, 117 AD2d 18, 19 PERB ¶7516 (2d Dept

that Johnson was not harmed by the alleged breach of the agreement. A copy of the agreement or its relevant provision was not introduced into evidence, and we find no credible evidence that the withdrawal decision was made following a merits-based determination by a disinterested Association representative.¹⁰ While Vogt claims that Hamrick recommended the withdrawal, we draw a negative inference from the Association's failure to call Hamrick as a witness.¹¹

As the ALJ correctly found, Vogt acted arbitrarily and in bad faith when she had the grievance withdrawn because Vogt had a vested interest in its outcome. The grievance was filed in response to her appointment at an hourly rate, which is more than twice the contract rate for her position. While the amended grievance deleted Vogt's name, the evidence presented at the arbitration might have disclosed facts concerning her personal interactions with the District that resulted in her particular rate of pay.¹² The arbitrator may have ordered a remedy adverse to Vogt's personal interests if the grievance was sustained. Vogt's bad faith is further supported by her failure to immediately and directly notify Waltman and Johnson of her decision to withdraw the grievance.

¹⁰ See, *DC37 (Blowe and Watson)*, 42 PERB ¶3008 (2009).

¹¹ *County of Tioga*, 44 PERB ¶3016 (2011). While a pre-hearing letter and its attachments from Hamrick to an ALJ were made a part of the hearing record, the parties did not stipulate to the truth of their content. ALJ Exhibit 6; Transcript, p. 6. The letter and attachments were received into the record as background information concerning the processing of the charge. Based upon the lack of an evidentiary foundation or a stipulation between the parties concerning the truth and genuineness of these documents, we have not considered the content of Hamrick's letter or the content of her e-mail to Vogt regarding the grievance, which is attached to the letter. ALJ Exhibit 6.

¹² If the District had unilaterally increased Vogt's salary beyond that permitted under the

During the hearing, Vogt did not provide any justification for her failure to voluntarily recuse herself from making the withdrawal decision in light of her self-interest. Her assertion in the May 13, 2009 e-mail that the Executive Committee was unable to make the decision because it lacked sufficient information lacks credibility. The decisional authority could have been delegated to another Association officer, or the entire Executive Committee, and the relevant documents and information could have been turned over to that decision maker. Furthermore, while Vogt claims that the grievance was discussed at the Executive Committee's May 12, 2009 meeting, the Association did not introduce into evidence the minutes or contemporaneous notes taken during the meeting.

In addition, we affirm the ALJ's discrediting of the reasons given by Vogt in her testimony and e-mail for deciding to withdraw the grievance. Credibility determinations made by an ALJ are entitled to substantial deference unless there is persuasive objective evidence warranting reversal of such findings.¹³ The pretextual reasons given by Vogt for the withdrawal constitute further evidence that she acted arbitrarily and in bad faith in violation of the Act.¹⁴

The objective evidence fully supports the ALJ's crediting of Waltman's testimony over Vogt's assertion that the Grievance Committee lacked sufficient information, documentation and review time with respect to the grievance. During the six months the grievance was pending, the Grievance Committee was on record as supporting it. Grievance Chairman Waltman and Grievance Committee members Henry and Hayes met with the School Superintendent on December 16, 2008, which resulted in a written

¹³ *County of Tioga, supra*, note 11.

agreement relating to the continued processing of the grievance. At a February 2009 meeting, the Grievance Committee voted in favor of processing the grievance to arbitration if the Board denied the grievance at Step 3. During the hearing before the ALJ, the Association failed to present any credible evidence that Grievance Committee members modified their support for proceeding to arbitration. Vogt's inconsistent and conclusory testimony concerning purported interactions with unspecified Grievance Committee members is not credible.

The record also fully supports the ALJ's discrediting of Vogt's claims that Hamrick did not receive the documents sent by Waltman and that Hamrick did not have sufficient time to prepare for the arbitration. Hamrick was not called to testify, and the Association did not present any evidence explaining why Hamrick did not contact Waltman about the requested documents or seek to adjourn the scheduled arbitration. We also affirm the crediting of Waltman's testimony that he did not receive Vogt's letter or messages. The Association did not introduce a copy of Vogt's letter and Vogt did not testify concerning the details of her alleged phone messages.

Based upon the foregoing, we affirm the ALJ's conclusion that the Association violated §209-a.2(a) of the Act when the grievance was withdrawn at Vogt's direction.¹⁵

DISTRICT ADDED AS A STATUTORY PARTY

It is well-settled that the duty of fair representation is encompassed within the

¹⁵ We reject the Association's argument, in its supplemental brief, that the amended charge should be dismissed because the District was not previously made a statutory party pursuant to §209-a.3 of the Act. Section 209-a.3 of the Act obligates that a public employer be named as a statutory party when the charge alleges a breach of the duty of fair representation in the processing of or failure to process a grievance. The failure to do so might impact the remedy for a violation of the duty of fair representation but it is not a jurisdictional infirmity requiring dismissal of the charge. Finally, the Association

legal obligations of an employee organization under §209-a.2(a) of the Act. Therefore, an employee organization breaches its duty of fair representation in violation of §209-a.2(a) of the Act when it fails to process a grievance under a collective bargaining agreement based upon an improper motivation.¹⁶

In 1990, the Legislature amended the Act to codify our jurisdiction and existing precedent concerning the duty of fair representation.¹⁷ The 1990 legislation added §209-a.2(c) of the Act, which reiterated that it is an improper practice for an employee organization "to breach its duty of fair representation to public employees under this article." The wording of §209-a.2(c) of the Act, and its legislative history, demonstrate that the Legislature did not intend to eliminate or modify our precedent finding that §209-a.2(a) of the Act imposes the duty of fair representation upon an employee organization.

The 1990 legislation did, however, modify the applicable procedure concerning an improper practice charge alleging that an employee organization breached its duty of fair representation in the processing of a unit member's claim under a negotiated contract. Prior to that modification, we lacked authority to impose a contractual remedy upon the employer in a duty of fair representation case unless the charging party alleged and proved that the employer violated an employee right under §209-a.1 of the Act. Instead, when a charging party proved only that the employee organization violated its duty of fair representation in processing a grievance under §209-a.2(a) of the Act, we ordered the employee organization to reimburse the charging party for the

¹⁶ *Brighton Transportation Auth (Raz)*, 10 PERB ¶3090 (1977); *Nassau Educ Chapter of the Syosset Cent Sch Dist Unit, CSEA, Inc. (Marinoff)*, 11 PERB ¶3010 (1978).

reasonable costs associated with pursuing a breach of contract action against the employer.¹⁸

CPLR §217.2(b), which was added by the same 1990 legislation, renders ineffectual our former breach of contract remedy. CPLR §217.2(b) mandates that a lawsuit against an employer premised upon an employee organization's breach of the duty of fair representation be commenced within four months from the time the employee knew or should have known of the breach or the date when the employee suffered harm. The filing and processing of an improper practice charge pursuant to §209-a.2(a) and/or (c) does not toll the applicable statutes of limitation for a lawsuit against an employee organization¹⁹ and/or an employer²⁰ based upon a breach of the duty of fair representation by the employee organization.²¹

Section 209-a.3 of the Act was aimed at modifying our agency's procedure by mandating that an employer be named as a statutory party in all duty of fair representation cases concerning the processing of contract grievances to ensure that we can order a contract-based remedy under §205.5(d) of the Act, thereby replacing our remedial approach of ordering an employee organization to fund a charging party's

¹⁸ *State of New York and Local 418, CSEA, Inc., Local 1000, AFSCME, AFL-CIO (Diaz)*, 18 PERB ¶13047 (1985), reversed, on other grounds, sub nom *CSEA v New York State Pub Empl Rel Bd and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dept 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

¹⁹ CPLR §217.2(a). One of the purposes of the 1990 legislation was to make the applicable statutes of limitation for a lawsuit against an employee organization or employer concerning the breach of the duty of fair representation to be the same as that for an improper practice charge.

²⁰ CPLR §217.2(b).

²¹ In fact, the 1990 legislation evinces a clear intent to limit an employee to only one

pursuit of a contractual remedy in court against the employer. Section 209-a.3 states:

The public employer shall be made a party *to any charge filed under subdivision two of this section* which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.
(Emphasis added)

By its express terms, §209-a.3 of the Act requires the employer to be named as a party in "any charge" filed under §209-a.2 of the Act alleging a breach of the duty of fair representation involving "the processing of or failure to process a claim." Notably, this legislatively mandated procedure is not limited to charges alleging a violation of §209-a.2(c) of the Act; it is applicable to a charge "filed under subdivision two of this section."

In the present case, we conclude that the District should have been made a statutory party to the charge because of the statutory mandate of §209-a.3 of the Act. Based upon that requirement, our powers under §213.6 of the Rules, and the facts and circumstances before us, we hereby add the District as a statutory party. In addition, we modify the proposed remedy because an Association-funded breach of contract action by Johnson against the District is time-barred pursuant to CPLR §217.2(b).

Finally, we reject the Association's contention that the addition of the District as a statutory party requires reversal of the ALJ's decision and a new hearing. The record demonstrates that the District received a copy of the charge, had an opportunity to intervene as a party, and participated to a certain extent in the hearing before the ALJ.²² In addition, the District declined the opportunity to file a brief with the Board concerning its status as a statutory party.

REMEDY

The purpose of a remedial order is to make a party "whole for the wrong sustained by placing them as nearly as possible in the position they would have been in had the improper practice not been committed."²³

The record in the present case establishes that the Association failed to engage in a merits-based determination of the class action grievance prior to withdrawing it from arbitration. To return Johnson to the *status quo ante*, we direct that the Association forthwith conduct a disinterested reconsideration and reevaluation of the merits of the grievance without regard to the impact it may have upon Vogt. Following that review and reconsideration, the Association shall inform Johnson in writing within sixty days either that the Association will prosecute his grievance to arbitration or identify the specific contractual and factual bases for its decision not to prosecute his claim.

If the Association decides to proceed with the grievance, the Association and the District shall process it to arbitration in accordance with the parties' negotiated grievance procedure.

IT IS THEREFORE ORDERED that the Association shall:

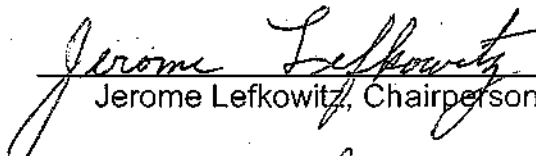
1. Forthwith conduct a disinterested reconsideration and reevaluation of the merits of the class action grievance filed by Charles Johnson without regard to the impact it may have upon Association President Janice Vogt;
2. Following the review and reconsideration, the Association shall inform Johnson in writing within sixty days of receipt of this order whether the

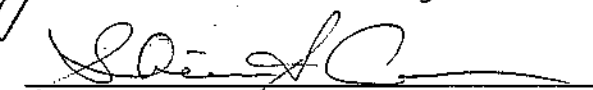
3. Association will prosecute the grievance to arbitration and, if not, the specific contractual and factual bases for that decision;
4. Cease and desist from conditioning the prosecution of grievances based upon the personal interests of Vogt or other Association officers;
5. Sign, post and distribute the attached notice in a manner normally used to communicate in writing and electronically with unit employees represented by the Association.

IT IS FURTHER ORDERED that if the Association decides to prosecute the grievance, the Association and District shall:

1. Process the grievance to arbitration in accordance with the parties' negotiated grievance procedure, and the Board retains jurisdiction to apportion between the Association and the District any damages that may be assessed as a result of the arbitration.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Dansville Central School District (District)
in the unit represented by the Dansville Support Staff Association (Association),
that the Association will:

1. Forthwith conduct a disinterested reconsideration and reevaluation of the merits of the class action grievance filed by Charles Johnson without regard to the impact it may have upon Association President Janice Vogt.
2. Following the review and reconsideration, the Association shall inform Johnson in writing within sixty days whether the Association will prosecute the grievance to arbitration and, if not, the specific contractual and factual bases for that decision.
3. If the Association decides to prosecute the grievance, the Association and the District shall process the grievance to arbitration in accordance with the parties' negotiated grievance procedure.

Dated

By
on behalf of **Dansville Support Staff Association**

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Public Employment Relations Board

In the Matter of

**CHAUTAUQUA LAKE CENTRAL SCHOOL
TEACHERS' ASSOCIATION,**

Petitioner,

CASE NO. CP-1313

- and -

CHAUTAUQUA LAKE CENTRAL SCHOOL DISTRICT,

Employer.

MARGARET KELWASKI, RN and MICHELLE HOLLEY, RN *pro se*

JEFFREY G. KEPPEL, for Petitioner

MICHAEL L. MUNLEY, ESQ., for Employer

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Margaret Kelwaski, RN (Kelwaski) and Michelle Holley, RN (Holley) to a decision of an Administrative Law Judge (ALJ),¹ granting a representation petition by the Chautauqua Lake Central School Teachers' Association (Association), pursuant to §201.2(b) of our Rules of Procedure (Rules), to place the position of registered nurse in a unit of employees of the Chautauqua Lake Central School District (District) represented by the Association.

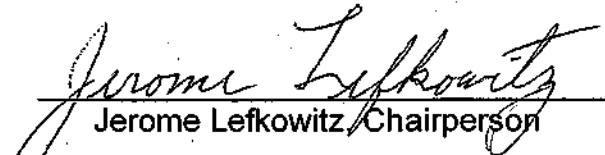
Pursuant to §213.2 of the Rules, only a party has standing to file exceptions. Consistent with §201.2(b) of the Rules, Kelwaski and Holley were not made parties to the Association's representation petition and they did not intervene pursuant to §212.1 of the Rules. Nevertheless, the District argued before the ALJ that the Association's petition should be denied because Kelwaski and Holley strongly objected to being represented. Based upon the fact that they were not parties before the ALJ, Kelwaski

and Holley do not have standing to file exceptions to the ALJ's decision.

Even if Kelwaski and Holley had standing we would deny the exceptions. In drafting §207.1 of the Public Employees' Fair Employment Act (Act), the Legislature did not include employee preference as one of the criteria for making a uniting determination. Thus, the preferences of Kelwaski and Holley are not relevant in determining the Association's unit placement petition.² In addition, the record does not support the factual grounds cited by Kelwaski and Holley for reversing the ALJ's decision to place the position in the Association's unit with other professional employees. Finally, placement of the position in the unit represented by the Association does not deprive them of their right to refrain from joining or participating in the Association pursuant to §202 of the Act.

Based upon the foregoing, we affirm the decision of the ALJ and grant the representation petition by placing the position of registered nurse in the unit represented by the Association.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

² *Unified Court System*, 22 PERB ¶13023 (1989), *pet dismissed*, *Crosson v. Newman*, 149 Misc 2d 499, 24 PERB ¶7001 (Sup Ct Albany County 1990), *affd*, 178 AD2d 719, 24 PERB ¶7020 (3d Dept 1991).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**POLICE BENEVOLENT ASSOCIATION
OF MOUNT KISCO, NEW YORK, INC.,**

Charging Party,

CASE NO. U-28888

- and -

VILLAGE/TOWN OF MOUNT KISCO,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

**BOND, SCHOENECK & KING, PLLC (CHRISTOPHER R. KURTZ
and TERENCE O'NEIL of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Police Benevolent Association of Mount Kisco, New York, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ) dated December 21, 2011, dismissing PBA's charge alleging that the Village/Town of Mount Kisco (Village) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the Village submitted seven disputed demands as part of its response to PBA's petition for interest arbitration.¹

For its exceptions, PBA asserts that the ALJ erred in concluding that negotiations had not ended when the Village submitted the at-issue demands to PBA, and misapplied the decision in *Village of Wappingers Falls*² (*Wappingers Falls*). In the

¹ 44 PERB ¶4620 (2011).

² 40 PERB ¶3020 (2007).

alternative, PBA urges that *Wappingers Falls* be reversed. The Village supports the ALJ's decision. Based upon our review of the record, and the positions of the parties, we affirm the ALJ's decision dismissing PBA's charge.

FACTS

The relevant facts are fully set forth in the ALJ's decision. They are repeated here only as necessary to address PBA's exceptions.

On April 30, 2007, formal proposals were exchanged between the parties during their initial negotiating session for a successor agreement. During subsequent negotiating sessions, however, the parties exchanged off-the-record proposals for settlement purposes only.

Following an impasse in negotiations, a mediator was appointed. The mediator conducted a formal mediation session on November 10, 2008. Among those representing PBA at the mediation was Anthony Solfaro (Solfaro). The Village's representatives included Christopher T. Kurtz (Kurtz) and Terence O'Neil (O'Neil). After the mediator met separately with each team, she had a brief discussion with Solfaro, Kurtz and O'Neil at the end of the mediation session. During that discussion, Solfaro stated that he would be sending Kurtz and O'Neil "in the immediate future" a final "take it or leave it" off-the-record PBA proposal aimed at reaching a settlement. No specific deadline, however, was set for PBA to make its final "off-the-record" proposal.

On November 17, 2008, Solfaro sent PBA's written settlement proposal to the Village, with a copy to the mediator.³ The proposal did not state that it was PBA's last and final offer. During subsequent conversations, Kurtz informed Solfaro that the

³ Brief of PBA, p. 2.

Village was reviewing the proposal, and that the Village might formulate a response. In reaction, Solfaro told Kurtz that PBA's offer "was take it or leave it, what's the response about?"⁴

On December 11, 2008, the Village sent a six-page document containing the seven at-issue demands to Solfaro and the mediator via e-mail. The document stated that it was on-the-record and for mediation. After reading the Village's on-the record proposal, Solfaro became quite upset because it was outside the parameters of the parties' off-the-record settlement discussions, and because it was on-the-record. He telephoned Kurtz to inform him that PBA would be filing a petition for interest arbitration. He also spoke with the mediator and sent her another copy of the Village's proposal. On December 16, 2008, PBA filed its petition with the Director of Conciliation. As part of its response to the petition, the Village included the at-issue demands contained in the Village's December 11, 2008 proposal.

At the conclusion of the hearing before the ALJ, PBA stated:

Our Charge is tied to the specifics of the demands that have been presented, not that the topics were not raised. We will stipulate that the subject matter for the topics of these demands were raised in negotiations; not, however, these particular demands, and that is our objection. These demands were not previously raised, and, therefore, these demands are the ones that cannot be arbitrated, not the topic.⁵

DISCUSSION

In *Wappingers Falls*, we held that an employer did not violate §209-a.1(d) of the

⁴ Transcript, p. 36.

⁵ Transcript, p. 61.

Act by submitting a proposal to interest arbitration that it first presented during mediation because the proposal was reasonably related to the subject matter of the negotiations.

In the present case, we reject PBA's argument that the mediation process ended following the close of the formal mediation session on November 10, 2008. The conduct of Solfaro and the Village belies PBA's argument. Solfaro submitted PBA's proposal to the Village and the mediator one week following the mediation session. The Village's proposal stated that it was for mediation, and it was sent to both PBA and the mediator. After becoming upset over the Village's proposal, Solfaro again communicated with the mediator, and sent her another copy of the Village's proposal. Notably, the petition for interest arbitration was not filed until five days after Solfaro had the opportunity to review and react to the Village's proposal. Based upon the totality of the circumstances, we conclude the Village's proposal was made prior to the expiration of mediation.

We also reject PBA's contention that the Village's proposal "was wholly unrelated to anything that had been discussed during negotiations."⁶ This argument is contradicted by PBA's admission during the hearing that the subject matter of the at-issue demands was raised during negotiations. In addition, PBA failed to meet its burden of proving that the content of PBA's proposal was not reasonably related to the subject matter of the negotiations or the discussions during the mediation. This failure of proof is due in large measure to the conscious decision by the parties, following the

⁶ Brief of PBA, p. 9.

first negotiation session, to characterize their proposals as off-the-record.

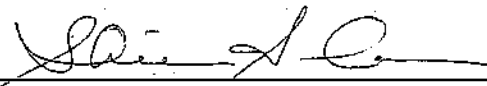
Finally, we are not persuaded by PBA's arguments for the reversal or narrowing of our decision in *Wappingers Falls*. Mediation constitutes a continuation of negotiations, during which an appointed third party seeks to assist the parties in reaching a voluntary agreement, and the continued exchange of proposals during mediation is fully consistent with policies of the Act. Nothing in *Wappingers Falls* prohibited PBA from responding to the Village's on-the-record proposal during the mediation process instead of terminating that process through the filing of a petition for interest arbitration.

Based upon the foregoing, we affirm the decision of the ALJ and dismiss the charge.

IT IS THEREFORE ORDERED that PBA's charge is dismissed.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

In the Matter of

RISCHARD EDWARDS,

Charging Party,

CASE NO. U-29844

- and -

**TRANSPORT WORKERS UNION OF GREATER
NEW YORK, LOCAL 100, AFL-CIO,**

Respondent.

- and -

**MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY,**

Employer.

RISCHARD EDWARDS, *pro se*

POLLY J. HALFKENNEY and RETU SINGLA, ESQS., for Respondent

**MARTIN B. SCHNABEL, ESQ., GENERAL COUNSEL (JOYCE R. ELLMAN of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Rischard Edwards (Edwards) to a ruling by an Administrative Law Judge (ALJ) denying Edwards's motion to amend his improper practice charge against the Transport Workers Union of Greater New York, Local 100, AFL-CIO (TWU) alleging that TWU violated §§209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) to add an allegation that the Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA) violated §209-a.1(g) of the Act. The ALJ denied the motion to amend on the ground that it is untimely pursuant to §204.1(a)(1) of our Rules of Procedure (Rules).

PROCEDURAL BACKGROUND

On or about February 23, 2010, Edwards filed a charge alleging that TWU violated §§209-a.2(a) and (c) of the Act when it failed to provide him with representation during a disciplinary conference conducted by MaBSTOA on December 21, 2009. The charge did not allege that MaBSTOA had violated the Act. Pursuant to §209-a.3 of the Act, however, MaBSTOA was made a statutory party to the charge.

On May 24, 2010, during the processing of his charge, Edwards made a motion to amend his charge to allege that MaBSTOA violated §209-a.1(g) of the Act when it denied him TWU representation during the December 21, 2009 disciplinary conference. In a letter decision dated July 14, 2010, the ALJ denied the motion as untimely because the proposed amendment set forth a new substantive claim under the Act against MaBSTOA. The ALJ reaffirmed her ruling in the decision dismissing the charge against TWU following a hearing.¹

DISCUSSION

In 2007, the Legislature amended the Act by adding §209-a.1(g) to create a new improper employer practice, and a related affirmative defense to such a charge, concerning the denial of representation during employer questioning of an employee who reasonably appears to be the potential subject of disciplinary action at the time of questioning. While §209-a.1(g) of the Act "is entitled to a liberal construction with respect to the representational rights protected,"² it does not modify the applicable timeframe for filing an improper practice charge. Pursuant to §204.1(a)(1) of the Rules,

¹ 44 PERB ¶4569, n.2 (2011).


a charge must be filed within four months from the date that a charging party has actual or constructive knowledge of the conduct that forms the basis for the charge. We apply this time period strictly. The pendency of a grievance in arbitration does not toll the period for filing a charge.³

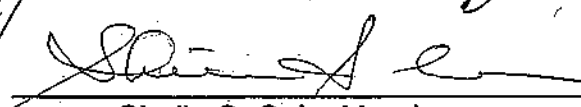
In the present case, Edwards's motion to amend the charge to add a claim that MaBSTOA violated §209-a.1(g) of the Act is untimely because it was made over six months after the December 21, 2009 disciplinary conference. Contrary to Edwards's argument, the pendency of his disciplinary grievance before an arbitrator did not toll his time for filing a charge against MaBSTOA.

Based upon the foregoing, we affirm the ALJ's ruling denying Edwards's motion to amend and affirm her decision to dismiss the charge against TWU.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

³ See, *Brighton Fire Dist*, 10 PERB ¶13091 (1977); *New York State Thruway Auth*, 40 PERB ¶13014 (2007).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WESTCHESTER COUNTY DEPARTMENT OF PUBLIC
SAFETY POLICE BENEVOLENT ASSOCIATION,
INC.,

Charging Party,

-and-

CASE NO. U-30339

COUNTY OF WESTCHESTER,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

ROBERT F. MEEHAN, COUNTY ATTORNEY (FREDERICK M.
SULLIVAN of counsel), for Respondent

BOARD DECISION AND ORDER

Following our review of the exceptions by the Westchester County Department of Public Safety Police Benevolent Association, Inc. (PBA), and the response by the County of Westchester, we affirm the decision by the Administrative Law Judge (ALJ) conditionally dismissing PBA's charge for the reasons set forth in the ALJ's decision¹ and based upon our prior decisions concerning the same maintenance of standards clause and the grievance

¹ 44 PERB ¶4563 (2011).

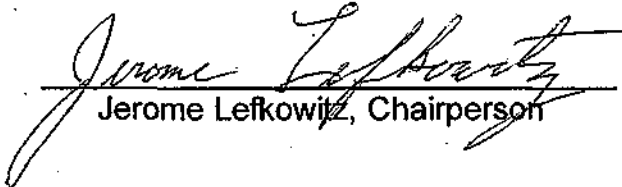
arbitration procedure in the parties' collectively negotiated agreement

(agreement).²

Based upon the foregoing, we affirm the ALJ's decision.

IT IS, THEREFORE, ORDERED that PBA's exceptions are denied, and the charge is conditionally dismissed.

DATED: March 5, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

²*County of Westchester*, 30 PERB ¶3073 (1997), on remand, 31 PERB ¶4623 (1998), *affd*, 32 PERB ¶3016 (1999), *petition dismissed*, *Westchester County Police Officers' Benevolent Assn v New York State Pub Empl Rel Bd*, 32 PERB ¶7023 (Sup Ct Albany County 1999), *revd and remanded*, 279 AD2d 847, 34 PERB ¶7002 (3d Dept, 2001), *lv denied*, 34 PERB ¶7016 (3d Dept 2001), *lv dismissed*, 96 NY2d 886, 34 PERB ¶7033 (2001), 97 NY2d 692, 35 PERB ¶7001 (2002), on remand, *petition dismissed*, 34 PERB ¶7032 (Sup Ct Albany County 2001), *affd*, 301 AD2d 850, 36 PERB ¶7001 (3d Dept 2003); *County of Westchester*, 42 PERB ¶3027 (2009); *County of Westchester*, 44 PERB ¶3020 (2011), *petition dismissed*, *Westchester County Police Officers' Benevolent Assn v New York State Pub Empl Rel Bd*, 45 PERB ¶7003 (Sup Ct Albany County 2012). See also, *Roma v Ruffo*, 92 NY2d 489, 31 PERB ¶7504 (1998); *CSEA v New York State Pub Empl Rel Bd*, 213 AD2d 897, 28 PERB ¶7004 (3d Dept 1995); *Town of Carmel*, 29 PERB ¶3073 (1996); *NYCTA (Bordansky)*, 4 PERB ¶3031 (1971); *City of Buffalo*, 4 PERB ¶3090 (1971).